

**Unofficial Draft Copy**

As of: November 16, 2005 (9:45am)

LC9994

\*\*\*\* Bill No. \*\*\*\*

Introduced By \*\*\*\*\*

By Request of the \*\*\*\*\*

A Bill for an Act entitled: "An Act providing for the payment of the expenses of a private entity, group, or individual in challenging the adoption, amendment, or repeal of a rule proposed or adopted in knowing or willful violation of the Montana Administrative Procedure Act; providing for the payment of expense claims by the Department of Administration from money appropriated to the department for that purpose; authorizing the department of administration to adopt rules; providing definitions; providing an appropriation and providing an immediate effective date and an applicability date."

WHEREAS, the process of making rules by administrative agencies of state government is a process involving many individuals, organizations, and other members of the public subject to agency rulemaking powers; and

WHEREAS, in many instances, state agencies have more resources than private persons to devote to the rulemaking process and rulemaking can therefore be a process weighted in favor of the agency proposing the rule; and

WHEREAS, the State Administration and Veterans' Affairs Committee is concerned that a state agency might violate, with relative impunity, a requirement of the Montana Administrative Procedure Act in the process of rulemaking and that persons in

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the private sector subject to a rule adopted in violation of the Montana Administrative Procedure Act may not be able to adequately challenge the rule because of limited resources; and

WHEREAS, the Committee's purpose is therefore to level the playing field between state agencies and members of the public involved in the rulemaking process by providing a mechanism for payment of expenses incurred by a member of the public in challenging a rule adopted in willful or knowing violation of the Montana Administrative Procedure Act.

Be it enacted by the Legislature of the State of Montana:

**NEW SECTION. Section 1. Violation of rulemaking provisions - challenge of proposed or adopted rule -- recovery of expenses - definitions.** (1) If, in the course of proposing, adopting, or both proposing and adopting, a rule pursuant to this chapter, an agency, including an individual within an agency, knowingly or purposefully commits a substantive violation of this chapter, a person challenging the proposed or adopted rule in an administrative proceeding pursuant to this chapter may recover, in the manner provided in this section, the expense of making the challenge.

(2) A Claim for payment pursuant to this section must be submitted to the department of administration for payment. Before denying a claim, the department shall provide an opportunity for a hearing pursuant to the contested case procedure of the Montana Administrative Procedure Act. A hearing

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held pursuant to this subsection must be held before a hearing officer provided by the attorney general.

(3) If the agency alleged to have violated the Montana Administrative Procedure Act is the department, an order written by the hearing officer is final.

(4) A payment made by the department, or ordered by a hearing officer pursuant to subsection (3), must be made from money appropriated to the department for that purpose by [section 2]. A decision by a hearing officer or the department not to make a payment pursuant to this section is final and is not subject to review pursuant to 2-4-702.

(5) The department may adopt rules to implement this section.

(6) The remedy provided by this section is in addition to any other remedy provided by law.

(7) As used in this section, the following definitions apply:

(a) "Department of administration" or "department" means the department of administration provided for in 2-15-1001.

(b) "Expense" means an out-of-pocket payment, including attorney fees, other professional services fees, and the cost of submitting a claim for payment pursuant to this section, up to and including a maximum amount of \$10,000.

(c) "Person" does not include an agency of state government.

(d) "Substantive violation": (i) includes proposing or adopting a legislative rule without express legal authority for

the rule, proposing or adopting a legislative rule without reasonable necessity for making a rule, implementing a proposed or adopted legislative rule or otherwise treating a proposed or adopted legislative rule as effective before its effective date, and proposing or adopting a legislative rule that is contrary to the statute being implemented by the rule.

(ii) does not include a violation by the secretary of state in the publication, arrangement, or distribution of the Montana Administrative Register or the MAR, a typographical or other clerical error, an incorrect citation to the law authorizing a rule to be adopted or to the law implemented by a proposed or adopted rule, or repetition in a rule of statutory language.

NEW SECTION. **Section 2. Appropriation.** There is appropriated from the general fund to the department of administration, \$\_\_\_\_\_ for the biennium ending June 30, 2007, for the purposes of paying claims made pursuant to [section 1].

NEW SECTION. **Section 3. {standard} Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 2, chapter 4, and the provisions of Title 2, chapter 4, apply to [section 1].

NEW SECTION. **Section 4. {standard} Effective date.** [This act] is effective on passage and approval.

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NEW SECTION. **Section 5. Applicability.** [This act] applies to a rule proposed or adopted in violation of Title 2, chapter 4, after [the effective date of this act].

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